Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ANTHONY ARMANDO RIOS,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL FOURTH APPELLATE DISTRICT DIVISION THREE

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1.

Whether Certiorari Should Be Granted to Establish That Exclusion of Some Members of the Public Who Are Supporters and Family Members of the Accused Violates the Sixth Amendment Right to a Public Trial Where There Is No Showing or Any Findings of the Necessity to Exclude Them in Order to Promote Some Higher Value.

2.

Whether Certiorari Should Be Granted Because California and Lower Federal Courts Have Erroneously Held That When a Closure of a Criminal Trial Is "Partial" or Excludes Only Part of the Public a Different Standard Applies to Determine Whether the Right to a Public Trial Has Been Violated

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1.

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Petitioner, ANTHONY ARMANDO RIOS, respectfully prays that a writ of certiorari issue to review the decision of Division Three of the Second District California Court of Appeal, affirming his criminal conviction.

OPINION BELOW

The opinion of the Court of Appeal, which was filed on August 4, 2009, as modified in an order filed on September 2, 2009, as well as the order of the California Supreme Court denying Mr. Rios' petition for discretionary review, are reproduced in the Appendix at pp. 1-45.

JURISDICTION

Jurisdiction of the Court is invoked pursuant to 28 U.S.C. Section 1257, subdivision (a). The order of the Supreme Court denying discretionary review was entered on November 19, 2009. Under Rule 13.1 of the Rules of this Court, this Petition is timely filed.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions,

the accused shall enjoy the right to a speedy and public trial, ..."

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

The federal question presented on this Petition were raised in the Los Angeles County Superior Court and on direct appeal to the California Court of Appeal and in Petitioner's petition for discretionary review in the California Supreme Court. The Court of Appeal addressed the issue extensively.

The opinion of the Court of Appeal sets out the evidentiary framework of the case, but overlooks some factual aspects of the case which are significant for an understanding of the arguments set forth here by Petitioner.

Petitioner was convicted of the murder of Jack Tseng, a drug dealer who was killed by a single shot from a .9 mm pistol. Essentially, the case turns on the credibility of Luis Gonzalez, who was interrogated by the police several times. He initially told the police that Ricky Martinez killed Tseng, and then said that a group or gang known as Brownsides was responsible. Eventually, he told the police, and later testified at trial, that Petitioner killed Tseng. His story was that he drove Petitioner to meet Tseng to buy cocaine but when they met outside of The Hat restaurant, Petitioner walked over to Tseng, talked to him briefly, and a shot rang out. According to Gonzalez, Petitioner returned to his car, and stated that he did not shoot, but only scared Tseng, but he then overheard

Petitioner talking to Larry Chairez (Larry), Petitioner's wife's nephew, on a cell phone, saying that he "popped" him and to erase his name from his phone book. Larry did not corroborate Gonzalez, however, the People's case was bolstered by circumstantial evidence, including: (1) claims by Gonzalez that Petitioner, Larry, and Petitioner's wife all threatened him unless he named Ricky Martinez as the killer; (2) evidence that cell phone calls were placed around the time Gonzalez claimed Petitioner called Larry and told him he had popped the victim; and (3) the testimony of Christopher Roa, a young marijuana dealer who identified Larry as the person who set up a buy of marijuana a few years earlier, but who robbed him of marijuana at gunpoint using a .9 mm pistol. Roa could not identify the person who drove Larry to the location of the robbery in a black Honda when shown photos of Petitioner by the police (during the investigation of the present case), but did identify a small tattoo on his neck as the same as one on the driver.

The defense vigorously disputed the testimony of Gonzalez and introduced evidence that Gonzalez had received immunity in return for his accusation of Petitioner and pointed out that he had initially identified Ricky Martinez as the killer, and blamed it on the Brownsides group, of which Petitioner was not a member. The defense also disputed that Petitioner was involved in any way in robbing Roa years earlier. Larry testified that he did not rob Roa. Petitioner's wife testified that she never threatened Gonzalez for implicating Petitioner, and Ricky Martinez testified for the prosecution that he did not kill Tseng.

A fair reading of the trial testimony suggests that the critical issues for the jury to decide, in order to

determine whether or not Petitioner was the killer, were: (1) whether or not Petitioner previously participated in the robbery of Roa; and (2) whether or not Petitioner or his wife, or Larry, threatened Gonzalez to persuade him not to inculpate Petitioner as the killer of Tseng.

In order to bolster their case, the People objected to any evidence that tended to show that anyone, including Gonzalez, had accused Ricky Martinez of the killing, and introduced evidence tending to show Petitioner's bad character, under the guise of evidence to impeach the defense witnesses.

When Petitioner's home was searched, police found an inoperable .9 mm pistol on his refrigerator, which was not used in the crime.

Petitioner moved to exclude Roa's testimony regarding the alleged prior robbery by Larry, and any evidence of the uninvolved gun from his home. Both were allowed into evidence.

Prior to jury selection, but after the trial began, a recorded statement by Gonzalez was the subject of a motion to exclude or redact. The People advised the trial judge that there had been threats against prosecution witnesses, and sought to exclude from the courtroom two female relatives and a friend of Petitioner who were in court to watch his trial. Over objection, the court excluded all three women for the entire day, and only allowed them to return the next morning.

On appeal to the state Court of Appeal and State Supreme Court, Petitioner contended the order excluding two of his female relatives and a female friend violated his constitutional right to a public trial

and was a structural error requiring automatic reversal of his convictions.

SUMMARY OF ARGUMENT

This Court should grant certiorari to address the specific standards by which criminal trial courts must, under the Sixth Amendment, approach and resolve motions to close the courtroom for a part of the proceedings, or as to a part of the public. The California Courts have strayed from the standards set forth in this Court's leading authority on the issue of exclusion of the public, *Waller v. Georgia*, 467 U.S. 39, 46, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984) ("*Waller*"), as have many of the federal circuits. This Court has not addressed "partial closure" cases, and lower courts have read a wide degree of latitude and relaxation of the rules set down for total closure into dicta from this court's decision in *Waller*.

In this case three supporters of the Petitioner were present in court when the prosecutor moved to exclude them. Two of them were relatives of Petitioner and the third was a friend.

The prosecutor represented that members of the defendant's family had been alleged to have "made threats" and stated that there were two police reports which said "the wife and nephew made threats."[1] The

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[1] The prosecution made its motion to exclude "the defendant's family" orally, without any notice and without any admissible evidence. The prosecutor stated:

"Because of security and because there

(continued...)

defense pointed out that neither the wife nor the nephew was in the court that day.

Defense counsel stated:

> "I think that the family certainly has a right to be here. The members that are here certainly have not been alleged to make any threats. If any threats have been made, they're allegedly oral threats. Nobody's been harmed. * * * So for [the prosecutor] Mr. Kraut to ask that the grandmother and other members be excluded without any showing that they have been involved in anything, I think is really out of line and they do have the right to be here." RT 4:16-28.

At the court's request, the three ladies present were identified as Petitioner's grandmother, his sister, and a friend. The court said to the prosecutor, "these individuals have not been involved in any threats. What is the concern concerning these individuals?" RT 5:8-10.

The prosecutor then said, without citing any actual statute or case law, that "we already know that two members of his family have threatened witnesses. The wife and the nephew have threatened harm to

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[1](...continued)

> have been threats - - and I have police reports, if the court is interested in them, associated with the defendant's family, and the defendant's family is now in court. For the 402 portion I would ask that they be removed from the courtroom because much of the information on that tape – or there's quite a bit of information on that tape with phone numbers, addresses, what they're concerned about, who they're concerned about being harmed and I think this is a safety issue to them because threats have already been lodged." RT 3:24-4:6.

witnesses, have followed them, have driven by their houses very slowly. I don't fault the Rios family for wanting to be in court, but the code in the Penal Code Section and the case law says that if - - - if the Court feels that it's necessary, the court can close this." RT 5:16-24

After reading two "incident reports" which apparently did not mention Petitioner's wife, but did refer to "two individuals,"[2] the trial court stated it had reviewed "the incident reports" and then said: "I don't know anything about the ladies who are present here in court, but for the purposes of the court making an evaluation of the tape, just in abundance of caution, I am going to ask that you not be in the courtroom while the tape is being played. So I'll ask you to step out and that's over defense objection." RT 6:20-25.

All of this was reported in the first six pages of the transcript of the morning session on August 8, 2007. However, although the court's order purported to be limited to the playing of the tape of an interview of Luis Gonzalez, in fact the order was expanded to cover the entire day of trial proceedings on August 8, 2007, which were by no means limited to the playing or evaluation of that tape.[3]

In the afternoon, with the three "ladies" (i.e., the family members and a friend) excluded, the court considered: (1) immunity letters for some prosecution witnesses (RT 13); (2) a request that Petitioner be

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[2] RT 6:3-4.

[3] At the close of the morning session on August 8, 2007, the court stated to defense counsel: "You might want to tell the family members . . . probably most of the day will be on the tape, so if they want to come back tomorrow." RT 12:1-4.

uncuffed and an unsworn allegation from the courtroom bailiff that Petitioner was affiliated with some gang (RT 14-15); (3) an argument regarding the admissibility of "excited utterances" which did not contain any phone numbers or addresses (RT 18); and (4) a discussion of discovery and interviews and witness lists (RT 18). Indeed, although the tape(s) of the Gonzalez interview(s) were played, the court did not rule on them on August 8, 2007.

Petitioner contends: (1) there was no justification at all for excluding two family members of Petitioner and another member of the public from the August 8, 2007 proceedings; (2) the trial court failed to make any proper record for its order excluding a portion of the public from a portion of Petitioner's trial; (3) this case does not fit into a narrow group of exceptions to the right to a public trial which allow limited closure, for good cause, establishing a "higher value" will be served by closure, based on evidence and written findings, as required by the decisions of this Court; (4) reversal is required without any showing of actual prejudice because denial of the right to a public trial is a structural error; and (5) As lower courts relax the rules for evaluating the denial of a public trial, they use phrases such as "minimal" and "de minimus" as a surrogate for injecting a harmless error standard into the analysis, which controverts this Court's holdings that violation of the right to a public trial is a structural error, in part because it is impossible to reliably determine whether or not the exclusion of the public, and most significantly, supporters of the accused, has deprived the defense of important information or rights.

ARGUMENT

1.

Certiorari Should Be Granted to Establish That Partial Exclusion of Some Members of the Public Who Are Supporters and Family Members of the Accused Violates the Sixth Amendment Right to a Public Trial Where There Is No Showing or Any Findings of the Necessity to Exclude Them in Order to Promote Some Higher Value.

Certiorari should be granted because the California Court of Appeal upheld a conviction where the record shows Petitioner was deprived of the right to a public trial as guaranteed by the Sixth Amendment.

A criminal defendant has a right to a public trial under the Sixth Amendment of the United States Constitution, made applicable to the states under the Fourteenth Amendment. The First and Sixth Amendments of the United States Constitution protect the public's right to attend all proceedings of a trial conducted in the courtroom. (*Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 511 (1984) (*Press-Enterprise*); *Waller, supra*, 467 U.S. 39, 46 ["[T]here can be little doubt that the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public"]; see also *Richmond Newspapers v. Virginia*, 448 U.S. 555, 580 (1980) (*Richmond Newspapers*).)

The right to a public trial is longstanding. "This nation's accepted practice of guaranteeing a public trial to an accused has its roots in our English common law heritage." (*In re Oliver*, 333 U.S. 257, 266 (1948).) "By the time of the adoption of the Constitution, public trials were clearly associated with the protection of the defendant." (*Gannett Co. v. DePasquale*, 443 U.S. 368, 387 (1979) (footnote omitted.)

The several protections afforded by the right to a public trial have been explained in the following ways: "No right ranks higher than the right of the accused to a fair trial. But the primacy of the accused's right is difficult to separate from the right of everyone in the community to attend the voir dire which promotes fairness." (*Press-Enterprise, supra,* 464 U.S. at p. 508.) "The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their function." (*In re Oliver, supra,* 333 U.S. at p. 257, fn. 25.) "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing. When a criminal trial is conducted in the open, there is at least an opportunity both for understanding the system in general and its workings in a particular case: 'The educative effect of public attendance is a material advantage. Not only is respect for the law increased and intelligent acquaintance acquired with the methods of government, but a strong confidence in judicial remedies is secured which could never be inspired by a system of secrecy.' " (*Richmond Newspapers, supra,* 448 U.S. at p. 572.)

> "The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Press-Enterprise Co. v. Superior Court of California, supra,* 464 U.S. at p. 510.

Although the right to a public trial is not absolute, it may only be abridged in certain circumstances not applicable here. *Richmond Newspapers, supra,* 448 U.S. at p. 581 and fn. 18. Also, in order to do so, important procedural requirements must be met. In this case, the trial court did not identify the reports it reviewed, and so it made no findings specific enough that a reviewing court can determine whether the closure order was properly entered. Moreover, after reviewing whatever the People showed the court during the hearing on the motion to exclude the three women, the trial court disclosed that no evidence had been produced having anything to do with any of the three people excluded. The Court stated:

> "I *don't know anything about the ladies who are present* here in court, but for the purposes of the court making an evaluation of the tape, *just in abundance of caution*, I am going to ask that you not be in the courtroom while the tape is being played. So *I'll ask you to step out* and that's over defense objection." RT 6:20-25. [Italics supplied.]

In other words, the trial court in this case excluded three women about whom the court knew nothing.

Petitioner believes that certiorari should be granted to determine the standards by which certain sub-sets of the public may be excluded[4] and to hold that by any standard supporters of the accused may not be excluded unless the trial court is given *some* information about the persons to be excluded.

Since here the trial court stated it did not "know anything about the ladies" ordered out, the exclusion is a constitutional violation, calling for reversal.

In the present case, no showing was made that the people excluded posed any threat to anyone, and they were not excluded based on any finding that they were involved in any way with the threats that the People *claimed* but had not proved had been made. Moreover, the trial court admitted as much just before excluding them, and failed to make any written findings, or any record at all as to what it reviewed prior to the order. Nor did the trial court engage in any balancing of competing interests. Rather, the court merely gave in to the People's request knowing that the persons being excluded were not even accused of doing anything wrong.

Finally, the order was purportedly solely for the playing of a tape recorded interview in which some phone numbers and addresses were spoken, which was itself not the narrowest possible remedy for the concerns voiced by the People, but in fact the court did not merely exclude them for playing one tape, but excluded them for the entire rest of the day.

The trial court's reason for the exclusion order, such as it was, in essence, was that the presence of

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[4] Here the three women excluded were, apparently, the *only* members of the public present.

Petitioner's grandmother and sister and a friend somehow posed some undescribed threat, which had not been the subject of any evidence, and which the defense disputed. However, the court was presented with no valid reason for the exclusion. No specific findings supported it. The court's order was not narrowly tailored to accomplish its stated goal.

Neither the court nor the prosecutor mentioned any statute that would purportedly trump the constitutional right to a public trial.

The trial court made no specific findings that exclusion was necessary. It specifically disavowed any claim it believed the three family members of the defendant it was excluding had been involved in any wrongdoing, when it stated:
"I don't know anything about the ladies who are present here in court" (RT 6:20-25)

The prosecutor did not file a motion for exclusion, as he was permitted to do, but merely asked for an order orally, and made no written showing, other than to allow the court to review some reports that were neither marked nor made a part of the record to support the exclusion order.

The court's above quoted assertions regarding its explanation for its exclusion order did not qualify as findings under the applicable standard because they did not identify a demonstrable history or likelihood of threats on the part of those excluded, or that they had ever acted on the defendant's behalf in some illegal or violent manner, or had any knowledge of or connection to the conduct which the prosecutor claimed the incident reports alluded to.

Even assuming that in this case there had been some basis for excluding someone from the trial court

proceedings (which there was not), the exclusion order was not narrowly tailored to safeguard that interest.

Lesser restrictive alternatives to exclusion that were readily available included admonishment by the court of the three people present, under pain of contempt, to keep the information which would be revealed in the hearings confidential and not threaten the witnesses in any way.

Also, the court could have restricted the morning proceedings, when the witnesses were excluded, to the playing of the tape that formed the basis of the prosecutor's motion for the exclusion order, but it clearly did not even attempt to do so. In fact, at the end of the morning session, at the beginning of which the exclusion order was made, the tape had not been played at all and the trial court told the defense attorney to tell the family members that they would be all day and not to return until the next morning. The tape had not yet even been played by that time, and other matters which did not include the statement of the addresses of witnesses were discussed.

No administrative inconvenience that might have resulted from a less restrictive alternative to exclusion implicated any " 'higher values' than that of a criminal defendant's constitutional right to a public trial." Thus, the trial court's exclusion order was not justified under the test enunciated in *Press-Enterprise* and *Waller*.

The court singled out Petitioner's two female relatives and a female friend for exclusion without any particularized finding they would misuse the identifying information that would be revealed in the hearing; pose a realistic threat of violence to the witnesses; or engage in obstruction of justice or

witness tampering. It was observed by this Court in *Oliver, supra*, that "without exception all courts [in the United States] have held that an accused is at the very least entitled to have his friends, relatives and counsel present, no matter with what offense he may be charged." 333 U.S. at 271-272, 68 S.Ct. 499. The persons excluded in this case were two relatives to whom the allegations on which the exclusion motion was based did not apply, and a friend. who also was not implicated in that allegation.

Also, the exclusion order was of limited usefulness because the defendant and his counsel would be present during the hearing and learn the names. Separately, it should be noted that if the exclusion was based on the people's status as the defendant's family members, it was impermissible.

This Court has held that a defendant should not be required to prove specific prejudice in order to obtain relief for a violation of the public-trial guarantee. "While the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance, the Framers plainly thought them nonetheless real. [Citations.] ..."The harmless error rule is no way to gauge the great, though intangible societal loss that flows' from closing courthouse doors." *Waller, supra,* 467 U.S. at p. 49 and fn. 9 [cited approvingly in *United States v. Gonzalez-Lopez*, 548 U.S. 140, n. 4 (2006).

The trial court violated Petitioner's right to a public trial by unjustifiably excluding three women, two of his relatives and a friend, from an entire day of the trial proceedings. As this was a structural error, which is not subject to harmless error analysis, reversal should have been automatic.

The opinion of the state Court of Appeal represents an erroneous analysis of the federal constitutional right to a public trial and the rules for evaluating a claimed denial of that right on appeal.

Petitioner respectfully submits that the recent trend in California jurisprudence relating to the Constitutional Right to a public trial is departing from the United States Supreme Court jurisprudence holding that any violation of the right is reversible per se, and the procedural safeguards imposed to ensure the right to an adequate appellate review of the closure of the courtroom in a criminal trial court proceeding are being overlooked on a slippery slope leading to a harmless error analysis of violations of the right which this Court has declared to be "structural error."

In *People v. Woodward*, 4 Cal.4th 376 (1992),[5] the California Supreme Court held that the Sixth Amendment right to a public trial creates a presumption of openness that can only be rebutted by a showing that exclusion of the public was necessary to protect some higher value. *Id.*, p. 383. The opinion of the Court of Appeal in this case, however, discussed the meaning of the term "higher value" by reference to lower federal and out of state court decisions including "protection of witnesses from threats, harassment, and/or physical harm. . .."[6] and noted that witness intimidation is a serious problem.

In *Woodward* the California Supreme Court went on to hold that the Sixth Amendment right to a public

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[5] Cited in the opinion in this case. See Opinion, Appendix, pp. 16, et seq.

[6] See Opinion, Appendix, 17.

courtroom was to be analyzed differently where, as here, a fraction of the public at large was excluded, citing as authority for that conclusion two intermediate federal appellate panel decisions.[7] This Court has never adopted a different analysis of a violation of the right to a public trial where less than the entire public has been excluded.

This Court has not endorsed even the *Woodward* decision, however, in the present case none of the procedural safeguards called for in *Woodward* were adhered to: there was no evidence offered to prove that exclusion was necessary for some higher value (i.e., "a showing that the exclusion of the public was necessary to protect some higher value."[8] (Underlining supplied.)), and there were no findings to that effect.

Nevertheless, because the California Supreme Court in *Woodward* confirmed that any violation of the right to a public trial requires reversal without regard to whether any prejudice is shown, *Id.*, 4 Cal.3d 383-384, the Court of Appeal in this case found no violation of that right.

In 2008, a panel of the same state Court of Appeal that decided the present case filed its published opinion in *People v. Esquibel*, 166 Cal.App.4th 539 (2008).[9]

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[7] Neither the Fourth Circuit, which decided *Snyder v. Coiner* 510 F.3d 224 (4th Cir. 1975), nor the Ninth Circuit in *United States v. Shirlock*, 865 F.2d 1069 (9th Cir. 1989), relied upon by the Court in *Woodward*, have addressed this issue *en banc*.

[8] See Opinion, Appendix, pp. 16-17, paraphrasing the *Woodward* holding at 4 Cal.4th p. 383.

[9] See e.g., ARB, pp. 3, 4, 5, 6, 7, 8, 9, and 10, and Respondent's Brief, pp. 24.

The court in *Esquibel* held that the partial closure of the courtroom, to exclude "select supporters" of the accused, does not create an automatic violation of the right to a public trial, in part because "the exclusion of spectators was for a minimal amount of time and because appellant's family supporters remained in the courtroom."[10]

Certiorari should also be granted to determine to what extent, if any, *Esquibel* is a correct statement of the law, or whether its reading runs afoul of the relevant Sixth Amendment jurisprudence, because in the present case even though the only "family supporters" present were not allowed to remain in the courtroom, the Court of Appeal still upheld the exclusion without any evidence in the record of any higher value, and without any allegations about the particular people excluded. Indeed, as noted, the trial court knew nothing about them when it ordered the three supporters of Petitioner out of the courtroom. There were no findings, written or otherwise, on this issue made by the trial court.

Moreover, *Esquibel* parsed the right to a public trial even further than the two tier analysis of the right endorsed in *Woodward* by distinguishing between "total closure" and "partial closure" and then holding that when only certain identified spectators are excluded there is an even less important "sub-category of the partial closure." 166 Cal.App.4th at 553.

Petitioner believes that the California decisions on the books prior to the decision in the instant case

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[10] This is language is emphasized by Petitioner, because in the present case all of Petitioner's supporters, including both of his family supporters, were removed.

reflect a march *away* from the basic principles in the decisions of this Court on the right to a public trial for both legal and practical reasons.

First, while cases like *Woodward* and *Esquibel* make a great deal out of the "partial" nature of closure, the idea that a partial closure risks less harm to the values protected by the right to a public trial is illusory because it is impossible to tell what a supporter of the defendant might see or hear that could be helpful to his defense in that part of the proceedings from which the supporters are excluded.

Second, although the Court of Appeal below apparently concluded that only specified spectators were excluded from Defendant's hearing and the public at large was not excluded, the record is totally unclear on that point -- it is impossible to tell whether anyone else was in the courtroom or sought admission to it during the hearing in which the two family members of Petitioner and one friend were excluded. The record does not establish that they were not the entire interested public, so the fact that the order did not *in terms* exclude the entire public, it very likely did exclude every member of the public present or interested in attending -- which from the standpoint of the Defendant's Sixth Amendment right is tantamount to total closure.

Finally, the terminology used by the panel in *Esquibel* such as "a minimal amount of time" or those used in the opinion below -- "too trivial to amount to a denial of Petitioner's right to a public trial"[11] appears to be nothing more than a surrogate for imposing harmless error analysis on a Constitutional error

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[11] Opinion, Appendix, pp. 18, 22.

which this Court has held not to be susceptible of prejudice analysis.[12] (Please see *Waller, supra,* 467 U.S. 39, 49, n. 9[13].

2.

Certiorari Should Be Granted Because California and Lower Federal Courts Have Erroneously Held That When a Closure of a Criminal Trial Is "Partial" or Excludes Only Part of the Public a Different Standard Applies to Determine Whether the Right to a Public Trial Has Been Violated.

Petitioner submits that the California trend in this area of the law has been a persistent erosion of the right to a public trial by means of parsing both the categories of closures, and by trivializing the probable prejudice from closures which are less than total.

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[12] Petitioner notes that during oral argument there appeared to be an undercurrent in the court's questions suggesting that there simply was no showing that Petitioner was harmed by the limited exclusion of two of his relatives and a friend. A copy of the oral argument recording is available and can be supplied on request. It supports the view that the idea that the error was not proven to be prejudicial may have inadvertently affected the Court of Appeal's conclusion that the exclusion of the only members of Petitioner's family who were present was not a violation of his right to a public trial.

[13] "While the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance, the Framers plainly thought them nonetheless real. [Citations.] ..."The harmless error rule is no way to gauge the great, though intangible societal loss that flows' from closing courthouse doors." *Waller, supra,* 467 U.S. at p. 49 and fn. 9 [cited approvingly in *United States v. Gonzalez-Lopez, supra,* 548 U.S. 140, n. 4.]

Neither of these trends is consistent with the decisions of this Court.

It appears that *because* courts are not constitutionally entitled to find that closure is harmless error, in order to achieve the same result courts have found ways to define such closures as non-violations of the right to a public trial.

However, even given the trend in the cases decided prior to this case, in California and in some lower federal and out of state courts, two immutable requirements found in both *Woodward* and *Esquibel* (both of which were analyzing the Sixth Amendment right as well as the state constitutional right to a public trial) have been the requirements of a "showing" that the closure was necessary to serve some higher value, and a very explicit record of findings.

In this case, however, the Court of Appeal has parted ways with both of those requirements because the opinion itself shows that: (1) the only "showing" the prosecutor proffered was his own oral announcement of his conclusions that someone [not the people being excluded] in Petitioner's family has threatened a witness; and (2) allowing the trial court to read, but not take into evidence, two police reports which prompted the trial judge to announce, after reading them, that the court had "no information" about the people being excluded.

Remarkably, despite the total absence, not only of specific written findings, but of any evidence whatsoever in the record to support the conclusion, the opinion below states that the "exclusion order in the present case was no broader than necessary." Opinion, Appendix, p. 20. This appellate "finding" is totally unreasonable and not supported by anything in the

record because the record shows nothing about the persons excluded.

In addition, the opinion allows unsupported assumptions about whatever was in police reports read by the trial judge, which are not a part of the record, to serve as a surrogate for any form of evidentiary or substantial "showing" of the facts which, when balanced against the defendant's right to have his family supporters in the courtroom, purportedly constitute evidence of a "higher value," trumping his Sixth Amendment right to a public trial.[14] Moreover, the opinion relies on rank speculation about what (without any evidence) the trial judge was "doubtless aware" of as further support for the order excluding the relatives.[15]

In fact, the opinion of the Court of Appeal supports the conclusion that *any time* there is an unsworn, unproven, uncorroborated *allegation* that "supporters" of the accused have threatened a witness, that allegation constitutes a "showing" that allows any other supporters of the defendant to be excluded from any part of the proceeding that might be relevant to the testimony of the allegedly threatened witness, because it is *possible* that any "supporters could

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[14] Opinion, Appendix, pp. 20-22. There the Court appears to have equated "representations of the prosecutor" and reports that "alleged that threats were made" by people *other than the ones excluded* as a substitute for any kind of substantial evidence or adequate "showing."

[15] The opinion continues, "the court did read the incident reports and was doubtless aware that supporters could communicate to others any information received in the courtroom. [footnote omitted]." Appendix, 21.

communicate to others any information received in the courtroom."[16]

There is simply no support in the case law from this Court for this sweeping conclusion, and certiorari should be granted to rein in the inferences the intermediate appellate courts are apparently willing to draw in this significant area of federal Constitutional law.

In addition, certiorari should be granted to explain what constitutes a "showing" sufficient to allow closure or partial closure to protect some "higher value" found in *Waller v. Georgia*, *supra*, 467 U.S. at p. 45, because clearly the California courts and several lower federal courts have relaxed that requirement to the point of non-existence.

For example, at least the Second, Fifth Eighth, Ninth, Tenth, and Eleventh Circuits have found that *Waller's* stringent standard does not apply to partial closures, and have adopted a less demanding test requiring the party seeking the partial closure to show only a "substantial reason" for the closure.[17] See also *United States v. Scott*, 564 F.3d 34, 38-39 (1st Cir. 2009) [finding no closure of the court even though the public could not enter or leave the courtroom during the jury charge. The court characterized the period as

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[16] Appendix, p. 21.

[17] *United States v. Farmer*, 32 F.3d 369 (8th Cir.1994); *Woods v. Kuhlmann*, 977 F.2d 74 (2d Cir.1992); *United States v. Sherlock*, 962 F.2d 1349 (9th Cir.1989), *cert. denied*,506 U.S. 958, 113 S.Ct. 419, 121 L.Ed.2d 342 (1992); *Nieto v. Sullivan*, 879 F.2d 743 (10th Cir.), *cert. denied*,493 U.S. 957, 110 S.Ct. 373, 107 L.Ed.2d 359 (1989); *Douglas v. Wainwright*, 739 F.2d 531 (11th Cir.1984), *cert. denied*,469 U.S. 1208, 105 S.Ct. 1170, 84 L.Ed.2d 321 (1985).

"quite brief" and cautioned that such a procedure should be used only "carefully and sparingly."]; *Sevencan v. Herbert*, 316 F.3d 76, 88 (2d Cir. 2002) [upholding exclusion of a family member based on an "implied finding" where the implication was necessary to support the *Waller* finding requirements.[18]

The present case is somewhat analogous to *Sevencan* because the proffered justification or "higher value" was witness safety. However, there the prosecution presented detailed evidence demonstrating how allowing the defendant's wife to remain in the courtroom could pose an actual threat to the witness (an undercover officer), unlike the present case where there was no evidence offered, and no findings. Nor was there any consideration of any alternative means of serving the alleged higher values relied upon in the present case.

This Court's guidance is needed to prevent the subtle shift from *Waller's* "overriding interest" test to the lower federal court's "substantial reason" test, to the virtually non-existent test utilized in California, and in particular, in the present case, becoming the standard by which the important Sixth Amendment right to a public trial is reduced from a meaningful right of the accused to a mere form of words, offering no protection, and offering no remedy for its violation.

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[18] The dissent in that case points out that the closure should have been upheld without this sweeping language, and the record in that case demonstrates the difference between an actual showing and findings and what took place in the present case -- assumptions, no evidence and no findings.

Conclusion

For all these reasons, this Court is urged to grant the writ and reverse the judgment of the state Court of Appeal affirming Petitioner's conviction.

WHEREFORE, Petitioner prays that this Honorable Court grant his Petition and issue its Writ of Certiorari.

Respectfully submitted this 17th day of February, 2010.

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APPENDIX

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Appendix 1

Court of Appeal, Second District, Division 3, California.
The PEOPLE, Plaintiff and Respondent,
v.
Anthony Armando RIOS, Defendant and Appellant.
No. B203606.
(Los Angeles County Super. Ct. No. GA067028).

Aug. 4, 2009.
As Modified on Denial of Rehearing Sept. 2, 2009.

APPEAL from a judgment of the Superior Court of Los Angeles County, Candace J. Beason, Judge. Affirmed.
Law Office of William J. Kopeny & Associates and William J. Kopeny for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Paul M. Roadarmel, Jr. and Margaret E. Maxwell, Deputy Attorneys General, for Plaintiff and Respondent.

KITCHING, J.

***1** Anthony Armando Rios appeals from the judgment entered following his convictions by jury of first degree murder (Pen.Code, § 187, subd. (a); count 1) and attempted second degree robbery (Pen.Code, §§ 664, 211)[1] with, as to each offense, firearm use (Pen.Code, § 12022.53, subd. (b)), personal and intentional discharge of a firearm (Pen.Code, § 12022.53, subd. (c)), and personal and intentional discharge of a firearm causing great bodily injury or

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[1]It is not clear from the record whether the attempted robbery was count 2 or count 4. There is no need to further address the issue.

death (Pen.Code, § 12022.53, subd. (d)), and with an admission that he suffered a prior felony conviction for which he served a separate prison term (Pen.Code, § 667.5, subd. (b)). The court sentenced appellant to prison for 51 years to life. We affirm the judgment.

FACTUAL SUMMARY

1. *People's Evidence.*

a. *The Testimony of Ricky Martinez Regarding the Murder of Jack Tseng.*

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206, 26 Cal.Rptr.2d 23, 864 P.2d 103), the evidence established that Jack Tseng (the decedent) and Ricky Martinez, who was 19 years old, were friends who met in high school. Tseng sold drugs. On June 24, 2006, Tseng told Martinez by phone that Tseng had cocaine to sell. That night, Martinez drove to an apartment building to pick up his friend, Luis Arceo. Martinez saw appellant, who lived next door to the building. Appellant asked if Martinez knew anyone who sold cocaine. Martinez referred appellant to Tseng.

Appellant used Martinez's phone to call Luis Gonzalez. Martinez then used Martinez's phone to call Tseng. Tseng indicated to Martinez that Martinez would have to come and get the cocaine, but Martinez explained that the drugs were not for Martinez. Martinez told Tseng that the buyer would arrive in a Dodge Stratus. After speaking with Tseng, Martinez gave his phone to appellant. Appellant told Tseng what appellant wanted, and agreed to meet Tseng. Appellant then told Martinez that appellant had to go to Arcadia. At some point, Tseng told Martinez that Tseng or appellant had to go to Fano Street.

Gonzalez arrived at appellant's location (near appellant's residence) in a Dodge Stratus. Arceo entered Martinez's Camaro, and appellant entered the Dodge. Martinez drove away with Gonzalez following. While driving, Martinez spoke to Tseng and appellant by phone. At some point, Martinez noticed that Gonzalez was no longer behind him. Tseng called Martinez to determine where appellant was.

About 9:21 p.m., appellant called Martinez and repeatedly said, " 'I popped him.' " Appellant told Martinez that if anyone asked, Martinez did not know appellant. Appellant also told Martinez that Martinez did not want to say anything which could endanger Martinez's family, and appellant was an " 'O.G.' " Appellant said to Martinez, "He said he didn't want to drop it so I had to pop him ." Appellant admitted shooting Tseng. Martinez heard Gonzalez speaking on the phone in the background and telling Martinez to pick up Gonzalez, who was afraid. Martinez called Tseng's phone, but no one answered.

*2 Martinez went to Gonzalez's house, picked him up, and drove him to Venice. During the drive, Gonzalez told Martinez what happened, i.e., appellant had shot Tseng, and Gonzalez drove appellant from the scene because Gonzalez was afraid. Martinez testified that Martinez took Gonzalez home, and Martinez came home after midnight. After the shooting, appellant would call Martinez and tell him that something would happen to Martinez or his family if Martinez talked with anyone. Martinez testified at trial under a grant of immunity.

b. *Gonzalez's Testimony Concerning the Murder of Tseng.*

Gonzalez, under a grant of immunity, testified as follows. Gonzalez knew Tseng from high school and knew that Tseng sold drugs. Gonzalez also knew appellant, socialized with him, and went to appellant's

home about every other day. Appellant had a black or dark blue Honda Accord and a red Honda Accord. Between February 2006, and September 12, 2006, appellant's head was completely shaved.

Gonzalez had phone numbers for appellant and Martinez stored in Gonzalez's phone. When appellant called, either the name Anthony or Mono was displayed on Gonzalez's phone. About 7:28 p.m. on June 24, 2006, Gonzalez used his phone to call appellant's phone. About 8:13 p.m., appellant used Martinez's phone to call Gonzalez's phone. Appellant asked Gonzalez to come to appellant's house and give appellant a ride. Gonzalez eventually complied.

Gonzalez drove the Dodge to appellant's house. Gonzalez saw Arceo. Martinez arrived in a Camaro and Arceo entered it. Appellant entered the Dodge and sat in its front passenger seat. Martinez drove away with Gonzalez following.

As Gonzalez drove towards Arcadia, appellant told Gonzalez that appellant was going to buy drugs. On Fano Street, somewhere between Santa Anita and First, appellant told Gonzalez to pull over and stop. Martinez's car kept going. Appellant said, " 'I think that's the guy.' " Gonzalez saw Tseng, who eventually walked towards the passenger side of the Dodge.

Appellant exited the Dodge, leaving the door open. Appellant spoke to Tseng. Gonzalez then heard a nearby gunshot. Gonzalez turned in the direction of the sound and saw Tseng running away. Appellant ran back to the Dodge and reentered it.

When appellant reentered the Dodge, Gonzalez saw a black gun in appellant's hand. Gonzalez, afraid, drove away. As Gonzalez drove, he asked appellant if appellant had shot Tseng. Appellant replied, " 'No, I just scared him.' " Appellant directed Gonzalez to the 210 Freeway. Gonzalez drove to appellant's house and, en route, appellant made several calls on his Nextel

phone. During one such call, appellant told Martinez, " 'You don't know me. You don't know who I am. Erase my number from your phone.' " Gonzalez told Martinez to come and get Gonzalez near Gonzalez's house.

While Gonzalez was driving, appellant told Gonzalez, " 'Don't snitch, don't be a rat, keep your mouth shut and you won't put your family in jeopardy.' " Appellant, who knew where Gonzalez lived, threatened to kill Gonzalez's little sister. Appellant also said, " 'there's no way that you would even know me. You guys are youngsters. I'm an O.G. I'm an old gangster.' " Appellant said something to the effect that they would not be traced. Appellant's reference to "O.G." caused Gonzalez concern. He knew that appellant had an El Sereno gang tattoo on his stomach and a Locke Street gang tattoo on his chest.

***3** Gonzalez dropped appellant off at appellant's house on Sultana. Gonzalez then drove to Gonzalez's neighborhood and parked his car about a block from his house. Martinez later arrived alone. Martinez and Gonzalez drove to a house on Venice Beach. Gonzalez returned home later that night. The next day, Gonzalez told his mother what had happened.

Gonzalez continued to associate with appellant after the shooting because he wanted to remain on good terms with appellant and did not want him to think that Gonzalez had "ratted" on appellant. Gonzalez denied that Gonzalez, Martinez, or Arceo murdered Tseng. Gonzalez testified appellant murdered Tseng.

c. *Additional Testimony of Gonzalez and Martinez.*

(1) *Gonzalez's Testimony.*

Gonzalez testified that, in August 2006, Los Angeles County Sheriff's Detective Shaun McCarthy

and his partner, Los Angeles County Sheriff's Detective Lauren, interviewed Gonzalez.[2] Gonzalez initially did not tell the truth.[3] Gonzalez told police that there were rumors that Martinez had committed the crime. However, appellant was the source of the rumors. Gonzalez also told officers that he had heard that Arceo had stabbed Tseng. Gonzalez also said there were rumors that "Brownside," a "crew," killed Tseng. Gonzalez was afraid of appellant.

During the interview, Gonzalez began crying. After Gonzalez asked for witness protection, Gonzalez told the detectives that he had followed Martinez to the location, Gonzalez had waved at Tseng, and appellant got out of the car, leaving the door open. Gonzalez also told detectives that after speaking with Tseng, appellant shot him. Gonzalez told the officers that appellant killed Tseng.

When police searched various residences, appellant's wife, Pattie Rodriguez, came to Gonzalez's residence and asked him who did it. Gonzalez told her that appellant did it. Rodriguez became hysterical. Gonzalez was somewhat afraid of Rodriguez. After

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[2] We, like the parties, will refer to the officers as detectives even though there was evidence they were sergeants.

[3] Gonzalez admitted he told detectives that he had heard that Martinez had let off a shot, and told detectives that Gonzalez was absent when the shooting occurred. Gonzalez probably told detectives that he had gone to appellant's house to get high. Gonzalez also said that Martinez arrived at appellant's house while Gonzalez and appellant were there, Martinez and appellant said they were "going to go connect," Martinez and appellant left, and, when the two returned, they said the "deal went bad." When Gonzalez was asked who told him that the drug deal had gone bad, Gonzalez claimed not to remember and said he was "stoned." This was before he started being honest with detectives.

appellant was arrested, Larry Chairez (appellant's nephew) called Gonzalez and asked Gonzalez why Gonzalez had "[said] it was [appellant]" and why Gonzalez had not blamed Martinez.

After appellant was in custody and prior to his preliminary hearing, appellant left a voicemail message on Gonzalez's cell phone. Appellant said, " 'You know what time it is,' " and told Gonzalez to call Rodriguez. Gonzalez considered the message to be a threat.

When Gonzalez came to court for appellant's preliminary hearing, he encountered Chairez. Chairez said something under his breath and looked angrily at Gonzalez. When Gonzalez testified at the preliminary hearing, appellant's family members, including Rodriguez, Chairez, and Chairez's sister, were present. Gonzalez testified that, at the preliminary hearing, he was afraid of appellant's family; therefore, Gonzalez "watered ... down" his testimony. Gonzalez falsely testified at the preliminary hearing that no gun was involved.

About three months prior to trial, Gonzalez was walking down the street when Chairez drove past. Chairez made a U-turn and followed Gonzalez. Chairez, using profanity, screamed that Gonzalez was, inter alia, a snitch and a rat. Gonzalez testified that Chairez said that Gonzalez was a " 'fucking bitch.' " Gonzalez testified that Chairez also said he would " 'kick [Gonzalez's] ass but I know that you're going to go to court and tell all kinds of lies.' "

(2) *Martinez's Testimony.*

*4 Martinez testified that police also contacted him. He lied to police and said he had been in Venice. He later told the truth and said that he had lied because he had been threatened by, inter alia,

appellant's wife and nephew. Martinez told police that Tseng called Martinez and said that Tseng had dope to sell, and appellant arranged to buy dope through Martinez. Martinez also told police that appellant called Martinez and said, " 'He didn't want to drop it, so I popped him.' " Appellant threatened Martinez, continued to call him, and asked if Martinez had talked to anyone. Following appellant's arrest, Martinez saw Chairez at a party. Chairez gave Martinez a phone and appellant's wife threatened Martinez.

d. *Additional Evidence.*

A series of calls placed between Martinez's phone and Tseng's phone about 8:48 p.m. and 9:19 p.m. registered to a cell site located about four blocks from First Avenue and Fano Street in Arcadia, the site of the shooting. A call placed at 9:22 p.m. from Martinez's phone to appellant's phone registered to a cell site north of the 210 Freeway.

At 9:22 p.m. on June 24, 2006, Tseng was taken to the hospital. He died at 10:57 p.m. as a result of a single gunshot wound to the abdomen. The wounds he received were consistent with Tseng turning away from the shooter as a single bullet was fired. A nine-millimeter bullet was removed from Tseng's body. Arcadia police discovered a nine-millimeter expended bullet casing located three feet south of the north curb at 39 Fano Street.

On September 14, 2006, police searched the residences of appellant, Martinez, Gonzalez, and Arceo. When police searched appellant's residence, appellant, a woman, and a young child were present. Police found a chromed handgun on top of the refrigerator. The gun's magazine contained four live nine-millimeter rounds. The gun was inoperable, and

the bullet recovered from Tseng's body was not fired from the gun found on the refrigerator.

In June 2006, Angeles Dorantes, Gonzalez's mother, noticed a change in Gonzalez's behavior. As a result, Dorantes and Gonzalez drove to a location on Sultana. After they arrived, a heavyset Hispanic man whose head was shaved exited an apartment, approached Gonzalez, and spoke to him. Gonzalez immediately walked to his mother. Gonzalez was shaking and almost crying. Gonzalez told his mother, " 'Mono asked me if I already told you about the incident in Arcadia.' " Gonzalez said that Mono had threatened to kill her and his family.

Dorantes learned about the murder from the Internet. She confronted Gonzalez about the matter, and he told her that appellant had threatened to blow up their house and kill Gonzalez's younger sister. Dorantes tried to persuade Gonzalez to tell the police, but he was afraid. Dorantes testified that, on one occasion, Gonzalez received a call on his cell phone. The name Mono appeared on the phone. Dorantes recognized the caller's voice as that of a person who previously called Gonzalez. The caller threatened to kill Gonzalez's family.

*5 According to Dorantes, on the afternoon of the police search, Rodriguez came to the residence of Dorantes and Gonzalez and asked Gonzalez what had happened. Gonzalez told Rodriguez that appellant did it. Rodriguez became hysterical and asked why Gonzalez did not say that Martinez had done it. Shortly after that conversation, Dorantes and Gonzalez were together when Gonzalez's cell phone rang. Gonzalez identified the caller as Pattie (Rodriguez's first name). Gonzalez put the call on a speaker, and Dorantes heard a woman's voice. The woman said to Gonzalez, " 'You rat, why didn't you say that Ricky did it[?]' "

e. *The Uncharged Roa Robbery*

Christopher Roa testified as follows. In 2005, Chairez called and asked to purchase a quarter-pound of marijuana from Roa. Roa previously had sold marijuana to Chairez. Chairez suggested the two meet at a restaurant in Temple City to conduct the sale. That night, when Roa drove into the restaurant's parking lot, Chairez was waiting in a two-door black Honda Accord. Appellant was sitting in the Accord's driver's seat.

Roa parked next to the Accord, and Chairez exited it and walked to Roa. Roa gave Chairez a gram of marijuana. Chairez said, " 'Let me go show my uncle real quick,' " and walked back to the Accord. Roa saw Chairez speak with appellant.

Chairez returned to Roa's car. Chairez pulled out a nine-millimeter Beretta, pointed it at Roa, and demanded everything Roa possessed. Roa had separated the quarter-pound of marijuana into four bags, each containing one ounce, and two of the bags were on his lap. Roa gave those two bags to Chairez. Chairez ran to the Accord, entered it, and appellant drove away. Chairez, who was perhaps 20 or 21 years old, was a couple of years older than Roa.

2. *Defense Evidence.*

In defense, McCarthy testified that when he interviewed Gonzalez, Gonzalez expressed concern about Brownsides and asked for witness protection. At one point, Gonzalez said he had heard that Martinez did it. However, after discussing witness protection, Gonzalez indicated appellant was the shooter. Dorantes told a district attorney investigator in August 2007 that Dorantes took Gonzalez's cell phone from him because he was receiving threatening calls

from appellant and Rodriguez. Dorantes only heard Rodriguez's last threat.

Rodriguez testified as follows. Appellant's nickname was Mono. On September 14, 2006, police searched Rodriguez's home. Police showed her a search warrant that listed three other addresses, including that of Gonzalez. Rodriguez denied calling Gonzalez and threatening him. On the day police arrested appellant, Rodriguez called Martinez, but did not threaten him. Rodriguez denied knowing a gun had been on her refrigerator. Rodriguez's sister, Ampelia, lived near Rodriguez, and Ampelia's son, Chairez, lived with Ampelia. Ampelia's daughter had a black Honda Accord.

Chairez testified as follows. Appellant was Chairez's uncle. Chairez denied robbing Roa. Chairez knew Martinez and Gonzalez, but denied threatening either of them. However, Chairez previously had threatened a person repeatedly by telephone, and Chairez initially lied to police about that threat. Chairez owned a black Honda Accord in 2005, but it was not involved in this threat incident. Appellant, or actually Rodriguez, previously had owned a black Honda Accord. In June 2007, Chairez drove alongside Gonzalez and yelled at him as Gonzalez was walking down the street. Chairez called Gonzalez, inter alia, a lying bitch and a little rat.

CONTENTIONS

*6 Appellant claims (1) the trial court's exclusion from the courtroom of three supporters of appellant violated his constitutional right to a public trial, (2) the trial court erroneously received evidence of the uncharged Roa robbery, (3) the trial court erroneously admitted evidence of appellant's bad character, (4) Chairez's statement made to Roa during the Roa

robbery was inadmissible hearsay and the trial court erred by admitting the statement, (5) the trial court erroneously excluded evidence that Gonzalez told Chairez that Martinez killed Tseng, and (6) cumulative prejudicial error occurred.

DISCUSSION

1. *No Violation of Appellant's Right to a Public Trial Occurred.*

Appellant claims the trial court erroneously excluded his grandmother, his sister, and a friend during a portion of the court's August 8, 2007 morning session and during the entirety of the afternoon session. For reasons discussed below, we disagree.

a. *Pertinent Facts.*

(1) *The August 8, 2007 Proceedings.*

(a) *The Court's Morning Session.*

On Wednesday, August 8, 2007 (day zero of ten), this case was sent to a trial court for jury trial, and the trial court's morning session began at 11:30 a.m. After discussion of other matters, the prosecutor asked that appellant's family be removed from the courtroom during Evidence Code section 402 proceedings pertaining to the admissibility of a videotape involving Gonzalez. The prosecutor indicated he was asking because threats had been made, and he had police reports pertaining to appellant's family. The prosecutor also indicated there were references in the videotape to addresses and phone numbers of persons who were concerned about being harmed.

Appellant objected that appellant's family had a right to be present, no threats had been made, any threats were allegedly oral, it had not been alleged that family members present in court had made threats, and no one had been harmed.

The court acknowledged there were three women present and asked what their relationship was to appellant. Appellant's counsel indicated the women were appellant's grandmother, his sister, and a friend. The following then occurred: "The Court: ... [¶] And, [prosecutor], the comments about-these individuals haven't been involved in any threats. What is the concern concerning these individuals?"[4]

The prosecutor later indicated he was not seeking exclusion of appellant's supporters during any Evidence Code section 402 admissibility proceedings except those during which the Gonzalez videotape would be played and the transcript read.

The prosecutor said "we already know" that two members of appellant's family had threatened witnesses. The prosecutor indicated appellant's wife and nephew had threatened to harm witnesses, had followed them, and had driven by their houses very slowly. The prosecutor indicated he did not fault the Rios family for wanting to be in court, but the court could "close this" if it felt it was necessary.

*7 The prosecutor later indicated that he had police reports concerning appellant's wife and nephew. The court asked to see the police reports, then the

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[4] Appellant quotes this in his opening brief, but omits the phrase "And, [prosecutor], the comments about." Appellant thereby suggests the trial court was asserting the individuals' noninvolvement. The full quote suggests the trial court was merely alluding to appellant's counsel's comments about the individuals' noninvolvement.

prosecutor simply indicated the police reports pertained to two individuals. The prosecutor did not thereafter assert that the police reports concerned appellant's wife and nephew. The prosecutor expressly denied that the reports pertained to appellant's wife. The prosecutor gave the police reports to the court.[5] The prosecutor also indicated the murder book contained references to threats by appellant's wife, but the prosecutor could not locate the references at that time. The court indicated it reviewed the police reports.

The court later indicated that it did not know anything about appellant's three supporters but, in order to evaluate the videotape, and out of an abundance of caution, the court was asking the supporters to not be in the courtroom while the tape was being played. Over appellant's objection, the court asked the three supporters to leave the courtroom. The prosecutor indicated the three supporters did not have to leave unless the first Evidence Code section 402 matter which the court was going to handle was the matter involving the Gonzalez videotape. The court indicated that that would be the case, and the prosecutor replied, "That's fine."

The court and parties then discussed the Gonzalez videotape and related transcript. The court indicated it might be better if the court, by itself, reviewed the transcript before reviewing it with the parties and listening to the videotape. As a result, the tape was not played during the morning session, and the court suggested it would play the videotape during the afternoon session. The above discussion referred to in this paragraph comprises about five pages of the reporter's transcript.

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[5] Th e reports are not part of the record before us.

The court indicated it was nearly noon, the court had other matters to handle, and proceedings would resume that afternoon. The court said, "you might want to tell the family members." The prosecutor asked if the admissibility proceedings pertaining to the videotape were going to take up the rest of the afternoon. The court replied that probably most of the afternoon would be spent on the videotape, "so if they want to come back tomorrow." The court recessed at noon.

(b) *The Court's Afternoon Session.*

At 2:00 p.m., the court called the case. The court handled prosecutorial immunity matters and court security issues. These matters comprise no more than three pages of the reporter's transcript.

The court then discussed the videotape. The court indicated the videotape reflected it pertained to an August 2006 interview of Gonzalez conducted by Los Angeles County Sheriff's Deputies McCarthy and Lauren at the Arcadia Police Department. The court and parties played the videotape while reviewing a transcript thereof which was marked Court's Exhibit No. 1 for identification. After reviewing the videotape, the court indicated it had made notes which the parties could review the next day. These matters comprise about two pages of the reporter's transcript.

***8** The prosecutor then commented that appellant had an excited utterance issue involving a civilian, and the prosecutor would put on pleading paper the changes that had been discussed regarding the videotape. The parties then discussed discovery of People's witnesses. The matter then adjourned at 4:14 p.m. These matters comprise about one page of the reporter's transcript.

The record of the August 8, 2007 proceedings during which appellant's supporters were excluded

from the courtroom so the Gonzalez videotape could be played comprises about seven pages of the reporter's transcript (i.e., five pages for the morning session and two pages for the playing of the tape during the afternoon session.)

(2) *Later Proceedings.*

Further admissibility proceedings on the Gonzalez videotape and transcript occurred on August 16 and August 17, 2007, leading to the production on the latter date of a redacted version of the transcript which was marked Court's Exhibit No. 4 for identification. On August 20, 2007, voir dire of prospective jurors commenced. Appellant was convicted by jury on September 11, 2007. Neither Court's Exhibit No.1 nor Court's Exhibit No. 4, were admitted in evidence at trial. The reporter's transcript in this case consists of seven volumes. The presentation of evidence at trial is contained in four of the volumes, and comprises a total of about 770 pages. This compares with the previously mentioned approximate seven pages devoted to the exclusion of the three supporters.

b. *Analysis.*

Appellant claims his right to a public trial was violated by the exclusion of the three spectators. We disagree.

(1) *Applicable Law.*

In *People v. Woodward* (1992) 4 Cal.4th 376, 14 Cal.Rptr.2d 434, 841 P.2d 954 (*Woodward*), the defendant claimed that the exclusion of additional spectators during closing argument at trial violated his right to a public trial. Our Supreme Court indicated

that the Sixth Amendment public trial guarantee creates a presumption of openness that can be rebutted only by a showing that exclusion of the public was necessary to protect some higher value. When such a higher value is advanced, the trial court must balance the competing interests and allow a form of exclusion no broader than needed to protect those interests. Specific written findings are required to enable a reviewing court to determine the propriety of the exclusion. (*Id.* at p. 383, 14 Cal.Rptr.2d 434, 841 P.2d 954.)

The protection of witnesses from threats, harassment, and/or physical harm is a higher value. (Cf. *Rovinsky v. McKaskle* (5th Cir.1984) 722 F.2d 197, 200; *United States v. Hernandez* (9th Cir.1979) 608 F.2d 741, 747; *Tinsley v. U.S.* (D.C.2005) 868 A.2d 867, 875; *Com. v. Penn* (Pa.Super.1989) 386 Pa.Super. 133, 562 A.2d 833, 837.) In a different context, our Supreme Court has emphasized the "serious nature and magnitude of the problem of witness intimidation .... the state's ability to afford protection to witnesses whose testimony is crucial to the conduct of criminal proceedings is an absolutely essential element of the criminal justice system." (*Alvarado v. Superior Court* (2000) 23 Cal.4th 1121, 1149-1150, 99 Cal.Rptr.2d 149, 5 P.3d 203, fn. omitted.)

*9*Woodward* noted that the decisions relied on by the defendant to support his public trial claim dealt with situations wherein the general public was entirely or substantially excluded from trial or pretrial proceedings. In contrast, in *Woodward,* only a portion of the trial was affected, existing spectators were allowed to remain in the courtroom, and any member of the public could enter the courtroom during specified recesses. *Woodward* concluded that the decisions relied upon by the defendant in that case were inapposite.

Woodward observed that at least one federal case, *Snyder v. Coiner* (4th Cir.1975) 510 F.2d 224, 230, had concluded that a brief, temporary closure of the courtroom to additional spectators during closing arguments should be deemed too trivial to amount to a denial of the public trial right. The court also observed that *U.S. v. Sherlock* (9th Cir.1989) 865 F.2d 1069, 1076-1077, applied a less exacting "substantial reason" standard for determining propriety of a partial exclusion of public from the courtroom.

(2) *Application of the Law to This Case.*

In the present case, the general public was not excluded from any proceeding in the court below, whether a pretrial proceeding or the trial itself. Moreover, appellant does not claim that his three supporters were excluded from any pretrial or trial proceedings, except for certain above discussed August 8, 2007 pretrial proceedings at the trial court's request.

As mentioned, during the morning session on August 8, 2007, the trial court asked appellant's three supporters to step outside. We assume without deciding that appellant's three supporters were excluded from the courtroom on August 8, 2007, when, after the court asked them to leave, the prosecutor suggested they did not have to leave immediately, the court suggested the Gonzalez's admissibility issues would be the "first 402," and the prosecutor replied, "That's fine." Nonetheless, the trial court asked that the three supporters not be in the courtroom "while the tape [was] being played." The trial court did not seek exclusion of the three supporters for any greater period of time or from any other proceeding.

Accordingly, we reject appellant's suggestion that the trial court ordered exclusion of the three supporters during "the entire day of trial [*sic*]

proceedings on August 8, 2007." In particular, we reject appellant's suggestion that the trial court, during the August 8, 2007 morning session, ordered exclusion of the supporters during the entirety of the rest of the August 8, 2007 proceedings by stating "you might want to tell the family members" and/or by stating "[p]robably most of the day [of August 8, 2007] will be on the tape, so if they want to come back tomorrow [on August 9, 2007]."

Fairly read, the trial court's statements above merely reflect that, as a courtesy to the three supporters, the court was indicating it might be a waste of their time for them to return for the August 8, 2007 afternoon session because most of the afternoon would probably be spent playing the tape and the supporters would be excluded from that proceeding. The trial court did not thereby expressly preclude the three supporters from attending afternoon proceedings during which the videotape was not being played. Nothing the trial court stated precluded the three supporters from reentering the courtroom during the afternoon of August 8, 2007, before or after the videotape was played.[6]

***10** In short, it appears the trial court excluded the three supporters from only two August 8, 2007 proceedings: (1) that portion of the morning session during which the court and parties apparently were prepared to play the tape (but, after the three spectators apparently left the courtroom, further discussions led the court to decide to play the tape

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[6] For example, nothing the trial court said precluded the three spectators from reentering the courtroom when, before the tape was played, the court dealt with immunity issues or when, after the tape was played, the prosecutor commented on the excited utterance issue.

during the afternoon session and suggest that the three spectators could come back the next day), and (2) that portion of the afternoon session during which the court and parties discussed the videotape and played it. Any relevant exclusion of the public was therefore partial and very brief. As mentioned, the record of the relevant morning and afternoon sessions during which the supporters were allegedly excluded comprises about five pages and two pages, respectively, of the reporter's transcript (as contrasted against, e.g., 770 pages of transcript for the presentation of evidence at a trial at which neither the public nor appellant's supporters were excluded).[7]

Whether viewed under the "overriding interest" or "substantial reason" test, the need to protect a witness from harassment or intimidation constitutes a higher value that, on a proper showing, may support exclusion of a defendant's family or friends from trial.

Moreover, the exclusion order in the present case was no broader than necessary. The trial court not only heard the representations of the prosecutor, including his representations that threats had been made and he had police reports pertaining to appellant's family, but read the provided incident reports. Appellant disputed that threats were made, but did not dispute that the incident reports alleged that threats were made. Nor did appellant dispute that the reports alleged that threats were made by family members other than those present in court. It is true that the prosecutor ultimately indicated that the threats were made by two individuals whom the prosecutor did not expressly identify, the prosecutor

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[7] We do not suggest that the issue of whether a temporary and partial exclusion of spectators from a courtroom violates a defendant's right to a public trial is determined by arithmetic.

never said that the police reports referred to the three spectators, and the court, after reading the incident reports, said, "I don't know anything about the ladies who are present here in court." However, we note the trial court did not, after reading the reports, dispute the prosecutor's implied characterization of the reports as alleging threats by a member(s) of appellant's family.

Further, the court did read the incident reports and was doubtless aware that supporters could communicate to others any information received in the courtroom.[8] The trial court did not exclude the general public but only the three supporters, and ordered only that the three supporters be excluded while the tape was being played.

We note that the Second Circuit has concluded that " 'once a trial judge has determined that limited closure is warranted as an alternative to complete closure, the judge ... [need not] *sua sponte* consider further alternatives.' [Citation.]" (*Bowden v. Keane* (2d Cir.2001) 237 F.3d 125, 131; *Brown v. Kuhlmann* (2d Cir.1998) 142 F.3d 529, 538 [accord].) We conclude the limited and temporary closure at issue was narrowly tailored. (See *Tinsley v. U.S., supra,* 868 A.2d at p. 878;

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[8] *Woods v. Kuhlmann* (2d Cir.1992) 977 F.2d 74, is illuminating. There, the trial court excluded all three members of the defendant's family who were in the courtroom that morning. (*Id.* at p. 75.) The trial court declined to attempt to determine which family member had actually visited and intimidated the witness. On appeal, the Second Circuit rejected the defendant's argument that the closure order was broader than necessary, in part because a nonexcluded family member could have disclosed the substance of the testimony presented in the courtroom. (*Id.* at p. 77.)

U.S. v. Sherlock (9th Cir.1989) 962 F.2d 1349, 1358.)[9] We also conclude the trial court's exclusion of the three spectators at issue in the present case was justified and simply too trivial to amount to a denial of appellant's right to a public trial.

(3) *None of Appellant's Arguments Compel a Contrary Conclusion.*

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[9] Appellant complains the trial court failed to make written findings, as required by our Supreme Court. *Woodward, supra,* 4 Cal.4th at p. 383, 14 Cal.Rptr.2d 434, 841 P.2d 954, held that "*[s]pecific written findings are required* to enable a reviewing court to determine the propriety of the exclusion." (Italics added.) *Waller v. Georgia* (1984) 467 U.S. 39, 45, 104 S.Ct. 2210, 81 L.Ed.2d 31, required only that the trial court make " 'findings specific enough that a reviewing court can determine whether the closure order was properly entered.' [Citation.]" However, we are bound by *Woodward.* (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455, 20 Cal.Rptr. 321, 369 P.2d 937.) Nonetheless, the trial court's failure to memorialize its findings in written form does not require reversal. *Woodward* found a trial court's failure to provide the defendant with notice of a temporary courtroom closure during closing argument was "at most a procedural due process violation" (*Woodward, supra,* 4 Cal.4th at p. 386, 14 Cal.Rptr.2d 434, 841 P.2d 954) susceptible to harmless error analysis. (*Id.* at pp. 386-387, 14 Cal.Rptr.2d 434, 841 P.2d 954.) The same is true here. The trial court's failure to make written, as opposed to oral, findings did not deprive appellant of a public trial. The purpose of the findings requirement is to ensure that a reviewing court can determine whether the exclusion order was properly entered. On the facts presented here, the trial court's oral findings are sufficient for that purpose. Any trial court error in failing to make written findings was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705.)

None of the cases cited by appellant, or his arguments, compel a contrary conclusion. This includes *People v. Prince* (2007) 40 Cal.4th 1179, 57 Cal.Rptr.3d 543, 156 P.3d 1015 (*Prince*), which concluded no infringement of the defendant's right to a public trial occurred when the trial court closed the courtroom, excluding all spectators, during a brief portion of a witness's trial testimony and during that portion of the jury argument pertaining to that testimony. We note appellant's citations to *Prince* simply reiterate *Woodward* principles which we already have discussed.

People v. Esquibel (2008) 166 Cal.App.4th 539, 82 Cal.Rptr.3d 803 (*Esquibel*), cited by appellant, does not help him. *Esquibel* concluded no violation of the defendant's right to a public trial occurred when the trial court excluded from the courtroom two nonfamily friends of the defendant during the trial testimony of a juvenile witness, where the defendant's family remained in the courtroom and the court did not order exclusion of the general public. *Esquibel* actually illuminates our analysis but, in any event, *Esquibel* certainly did not hold that a trial court's brief exclusion of three family members from pretrial admissibility proceedings to which the general public was not excluded violated a defendant's right to a public trial no matter what the circumstances. Moreover, although appellant suggests that *Woodward, Prince*, and *Esquibel* reflect a "march *away* from the basic principles in the decisions of the United States Supreme Court on the right to a public trial," we are bound to follow *Woodward* and *Prince*. (*Auto Equity Sales, Inc. v. Superior Court, supra,* 57 Cal.2d at p. 455.)

In his petition for rehearing, appellant asserts the record is totally unclear on the point of whether "only specified spectators were excluded from appellant's hearing and the public at large was not excluded[.]" We note the trial court in the present case expressly ordered only three spectators to leave and did not expressly order anyone else to leave. Nothing in the record of the admissibility proceedings indicates that anyone else in the general public who may have wished to enter the courtroom was barred from doing so. We note that appellant, elsewhere in his petition, asserts that *Woodward* held that the Sixth Amendment right to a public courtroom was to be analyzed differently "where, *as here,* a *fraction* of the public at large was excluded [.]" (Italics added.)

2. *The Trial Court Did Not Prejudicially Err by Admitting Evidence of the Uncharged Roa Robbery.*

a. *Pertinent Facts.*

*11 The court conducted an Evidence Code section 402 hearing on the admissibility of testimony from Roa that, on a previous occasion, Chairez robbed him and appellant was involved in the robbery. The resulting pertinent trial testimony is set forth in our Factual Summary. The pertinent facts leading to the trial court's ruling as to the admissibility of Roa's trial testimony are set forth below.

On August 17, 2007, during argument at the admissibility hearing, the prosecutor argued that the Roa robbery and the present attempted robbery (hereafter, present offense) were almost identical because, in each instance, appellant used a vehicle to arrange a drug deal at a place other than the homes of the participants, but an attempt was later made to rob the drug dealer. The prosecutor argued the only

difference between the Roa robbery and the present offense was that Tseng was killed for refusing to surrender his drugs. The prosecutor later indicated that the Roa robbery was admissible to prove a common plan, knowledge, scheme, motive, and opportunity. The prosecutor suggested the Roa robbery was also admissible on the issue of identity.

At one point, appellant's counsel suggested concerning the Roa robbery that "Mr. Rios was in the [car] seat (*sic*)" "under very suspicious circumstances." However, appellant argued the Roa robbery and the present offense were too dissimilar for the Roa robbery to be admissible, and evidence of the Roa robbery was "prejudicial."

The court indicated it had reviewed Evidence Code section 1101, subdivision (b), and relevant case law. The court indicated a pertinent factor was whether the uncharged offense was offered "for purposes of identity or ... intent or ... common design or plan." The court later indicated the Roa robbery and the present offense were "of sufficient similarity to meet the requirement of [Evidence Code section 1101, subdivision (b)] for everything except for identity." The court tentatively ruled the Roa robbery was admissible. During further argument on August 20, 2007, the prosecutor stated "we're showing plan and scheme in order to show the intent which raises it up to a homicide and not accidental."

The court indicated the Roa robbery was not admissible on the issue of identity, but was admissible on the issues of motive and "common scheme and plan." The court later stated, "[s]o the court's tentative is the same" and, still later said, "The court's ruling or tentative is now the order. So the 1101(B) will come in

with a limiting instruction."[10] We will present additional facts below as pertinent.

b. *Analysis.*

Appellant claims the trial court's admission of evidence of the Roa robbery violated Evidence Code section 1101, subdivision (b),[11] Evidence Code section

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[10] The court preinstructed the jury on the issue of the uncharged Roa robbery, and indicated the jury would receive a more complete instruction later. During the final charge to the jury, the court, using CALJIC No. 2.50, instructed on the issue of evidence of other crimes as follows: "Evidence has been introduced for the purpose of showing that the defendant committe[d] crimes other than that for which he is on trial. [¶] This evidence, if believed, may not be considered by you to prove that defendant is a person of bad character or that he has a disposition to commit crimes. It may be considered by you only for the limited purpose of determining if it tends to show: [¶] A characteristic method, plan or scheme in the commission of criminal acts similar to the method, plan or scheme used in the commission of the offense in this case which would further tend to show the existence of the intent which is a necessary element of the crime charged or a clear connection between the other offense and the one of which the defendant is accused so that it may be inferred that if defendant committed the other offenses defendant also committed the crimes charged in this case; [¶] The existence of the intent which is a necessary element of the crime charged; [¶] A motive for the commission of the crime charged; [¶] The defendant had knowledge or possessed the means that might have been useful or necessary for the commission of the crime charged. [¶] For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case. [¶] You are not permitted to consider such evidence for any other purpose."

[11] Evidence Code section 1101, subdivisions (a) and (b), (continued...)

352, and appellant's right to a fair trial. We reject appellant's claim.

Although the gravamen of appellant's argument in the trial court, and here, has been that evidence of the Roa robbery was inadmissible on the issues of "common plan or design" and identity, we need not reach those issues. "[The] distinction, between the use of evidence of uncharged acts to establish the existence of a common design or plan as opposed to the use of such evidence to prove *intent* or identity, is subtle but significant. Evidence of *intent* is admissible to prove that, if the defendant committed the act alleged, he or she did so with the intent that comprises an element of the charged offense.... [¶] Evidence of a common design or plan is admissible to establish that the defendant committed the *act* alleged.... [¶] Evidence of *identity* is admissible where it is conceded or assumed that the charged offense was committed by someone, in order to prove that the defendant was the perpetrator." (*People*

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[11](...continued)
state, in relevant part: "(a) Except as provided in this section and in Sections 1102, ... evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion. [¶] (b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, ...) other than his or her disposition to commit such an act." Evidence Code section 352 states, "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

v. Ewoldt (1994) 7 Cal.4th 380, 394, fn. 2, 27 Cal.Rptr.2d 646, 867 P.2d 757, first italics added, (*Ewoldt*).)

***12** At the August 17, 2007 hearing, the court, discussing the issue of the similarity of uncharged and current offenses, indicated a pertinent factor was whether the uncharged offense was offered "for purposes of identity or whether it has to do with *intent* or whether it has to do with common design or plan." (Italics added.) The court later indicated the Roa robbery and the present offense were "of sufficient similarity to meet the requirement of [Evidence Code section 1101, subdivision (b)] *for everything except* for identity." (Italics added.) The court tentatively ruled the Roa robbery was admissible. We believe that, fairly read, the trial court's August 17, 2007 tentative ruling was that the Roa robbery was admissible to prove issues other than identity, and that those issues included the issue of intent.

Moreover, on August 20, 2007, during additional admissibility proceedings, the prosecutor indicated, although perhaps inartfully, that he was proffering the Roa robbery on the issue of intent when the prosecutor said, "we're showing plan and scheme in order to show the *intent* which raises it up to a homicide and not accidental." (Italics added.) The trial court's subsequent final ruling expressly affirmed the tentative ruling and, pursuant to the latter, the Roa robbery was admissible on the issue of intent. We conclude the trial court's final ruling was that the Roa robbery was admissible on several issues, including intent. [12]

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[12] That the trial court's final ruling was that the Roa robbery was admissible on the issue of intent is corroborated by (continued...)

"The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent. [Citation.] '[T]he recurrence of a similar result ... tends (increasingly with each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, i.e., criminal, intent accompanying such an act....' [Citation.] In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant " 'probably harbor[ed] the same intent in each instance." [Citations .]' [Citation.]" (*Ewoldt, supra,* 7 Cal.4th at p. 402, 27 Cal.Rptr.2d 646, 867 P.2d 757.) A greater degree of similarity is required to prove the existence of a "common design or plan" (*ibid.*), and [t]he greatest degree of similarity is required for evidence of uncharged misconduct to be relevant to prove identity." (*Id.* at p. 403, 27 Cal.Rptr.2d 646, 867 P.2d 757.)

As indicated, the least degree of similarity between the Roa robbery and the present offense was required to prove intent. As respondent observes, there were ample similarities. The victims in both incidents were young drug dealers. Both incidents were initiated as an ostensible drug purchase. In each instance, someone familiar to the victim phoned the victim and arranged the drug transaction. Both incidents occurred at night.

Moreover, the meeting locations were not the participants' residences. Appellant arrived at each

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[12](...continued)
the court's final charge to the jury, which repeatedly indicated the Roa robbery was admissible on the issue of intent. (See fn. 10, ante.)

location in a vehicle. Each incident involved a victim, appellant, and a young man with close ties to appellant. There was evidence a nine-millimeter gun was used in each instance. There was evidence that appellant participated in both encounters, i.e., that he was the shooter in the present case, and was the driver and a person with whom Chairez consulted during the Roa robbery. Appellant appeared to concede below that he was, in suspicious circumstances, sitting in the vehicle used during the Roa robbery. There was evidence appellant committed the present offense.

***13** We conclude there is no need to reach the issues of whether evidence of the Roa robbery was admissible on the issues of common plan or design, or identity, because the Roa robbery was highly probative on the issue of intent to rob. The fact that there may have been dissimilarities between the Roa robbery and the present offense does not compel a contrary conclusion. Moreover, appellant, by his not guilty plea, raised the issue of intent, and took no action to narrow the prosecution's burden of proof on the issue. (*Ewoldt, supra,* 7 Cal.4th at p. 400, fn. 4, 27 Cal.Rptr.2d 646, 867 P.2d 757.)

A trial court enjoys broad discretion under Evidence Code section 352, in assessing whether probative value outweighs undue prejudice, confusion, or consumption of time. (*People v. Brown* (2000) 77 Cal.App.4th 1324, 1337, 92 Cal.Rptr.2d 433.) A trial court need not expressly weigh prejudice against probative value, or even expressly state it has done so. All that is required is that the record demonstrates the trial court understood and fulfilled its responsibilities under Evidence Code section 352. (*People v. Williams* (1997) 16 Cal.4th 153, 213, 66 Cal.Rptr.2d 123, 940 P.2d 710.) An appellate court applies the abuse of discretion standard of review to any ruling concerning Evidence Code section 352. (*People v. Waidla* (2000) 22

Cal.4th 690, 717, 723-725, 94 Cal.Rptr.2d 396, 996 P.2d 46.)

In the present case, evidence of the Roa robbery was not more inflammatory than the facts of the present offense. The Roa robbery, which occurred in about 2005, was not too remote in time (cf. *Ewoldt, supra,* 7 Cal.4th at p. 405, 27 Cal.Rptr.2d 646, 867 P.2d 757; *People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1212, 105 Cal.Rptr.2d 187), and usually any remoteness of evidence goes to weight, not admissibility. (*People v. Archerd* (1970) 3 Cal.3d 615, 639, 91 Cal.Rptr. 397, 477 P.2d 421.) Moreover, this is not a case in which the other crimes evidence was "cumulative regarding an issue that was not reasonably subject to dispute." (*Ewoldt, supra,* 7 Cal.4th at p. 406, 27 Cal.Rptr.2d 646, 867 P.2d 757.)

The fact that no evidence was presented that appellant had been convicted for the Roa robbery increased the risk that the jury would convict him of the present offense to punish him for the prior one. However, *People v. Frazier* (2001) 89 Cal.App.4th 30, 107 Cal.Rptr.2d 100, facing a similar issue (and without indicating whether the defendant had been convicted of the prior offenses there at issue) observed, "A risk does exist a jury might punish the defendant for his uncharged crimes regardless of whether it considered him guilty of the charged offense.... This risk, however, is counterbalanced by instructions on reasonable doubt, the necessity of proof as to each of the elements of [the charged offense] ..., and specifically that the jury 'must not convict the defendant of any crime with which he is not charged.' " (*Id.* at p. 42, 107 Cal.Rptr.2d 100.)

Here too, the court instructed the jury, using CALJIC No. 2.90, on reasonable doubt, and instructed on the elements of first degree murder and attempted second degree robbery. Moreover, the court, using

CALJIC No. 2.50, instructed the jury during the final charge that they were to consider the Roa robbery only on a limited number of issues, including intent. We presume the jury followed the instructions. (Cf. *People v. Sanchez* (2001) 26 Cal.4th 834, 852, 111 Cal.Rptr.2d 129, 29 P.3d 209; *People v. Callahan* (1999) 74 Cal.App.4th 356, 372, 87 Cal.Rptr.2d 838.) To the extent the prosecutor, during jury argument, related the Roa robbery to the issue of identity in the present case, the trial court, using CALJIC No. 1.02, instructed the jury that statements by an attorney were not evidence and, using CALJIC No. 1.00, instructed the jury that if anything concerning the law said by the attorneys in their arguments conflicted with the court's instructions on the law, the jury was required to follow the court's instructions. Again, the court instructed on the limited issues for which the jury was to consider the Roa robbery. Fairly read, the instruction indicated identity was not such an issue. The jury is presumed to have followed that instruction. The trial court did not err by admitting evidence of the Roa robbery.

***14** Finally, even if the claimed evidentiary error occurred, there is no real dispute in this appeal that someone committed first degree murder upon, and attempted to rob, Tseng. The real issue here is identity. The testimony of Martinez, Gonzalez, and Dorantes (considered in light of the totality of the evidence, including the evidence of various threats made to witnesses) and the evidence from the phone records that placed appellant near the crime scene of First Avenue and Fano Street about the time of the murder, provided ample evidence that appellant was the murderer. The claimed evidentiary error was not prejudicial. (Cf. *People v. Watson* (1956) 46 Cal.2d 818, 836, 299 P.2d 243.) Appellant has failed to demonstrate that receipt of the challenged evidence

violated due process. (Cf. *People v. Catlin* (2001) 26 Cal.4th 81, 122-123, 109 Cal.Rptr.2d 31, 26 P.3d 357.)

3. *The Trial Court Did Not Erroneously Admit Evidence of Appellant's Bad Character, or Erroneously Exclude Evidence of His Wife's Good Character.*

a. *The Gun Evidence Was Admissible.*

(1) *Pertinent Facts.*

Prior to trial, the court and parties discussed the admissibility of testimony by a police officer that, during a search of appellant's home, the officer found a nine-millimeter gun on top of a refrigerator. Appellant objected that the gun was irrelevant. The court indicated the prosecutor was offering the gun "for confirmation" and to show that a nine-millimeter gun was appellant's weapon of choice. The court also indicated that if evidence was received that a nine-millimeter gun was used during the Roa robbery, and a bullet from a nine-millimeter gun was recovered from Tseng, then evidence that a gun was found on top of the refrigerator would be admissible to show (1) appellant was familiar with, and had, guns, (2) Gonzalez's state of mind, i.e., that Gonzalez knew appellant had guns and was therefore afraid of him, and (3) that appellant had a tendency to use nine-millimeter guns. The court made clear that the evidence of the gun found on the refrigerator would be admissible only if it was made clear to the jury that (as was in fact the case) the gun was not operable and was not the gun used in the present case. The court noted at one point that it was weighing the probative value of the evidence against its potential prejudicial effect.

At trial, an officer testified that a chromed handgun was found on top of the refrigerator in appellant's home during the execution of a search warrant. The gun's magazine contained four live nine-millimeter rounds. The parties stipulated the gun was inoperable, and that the bullet recovered from T'seng's body was not fired from the gun on the refrigerator.

(2) *Analysis.*

Appellant claims the evidence of the gun found on the refrigerator was irrelevant and excludable under Evidence Code section 352. We disagree. Evidence Code section 210, states, in pertinent part, that: " 'Relevant evidence' means evidence ... having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." Evidence Code section 350, states: "No evidence is admissible except relevant evidence." An appellate court applies an abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence, including a ruling concerning relevance. (*People v. Waidla, supra,* 22 Cal.4th at p. 717, 94 Cal.Rptr.2d 396, 996 P.2d 46.) Moreover, "Any otherwise admissible evidence of habit or custom is admissible to prove conduct on a specified occasion in conformity with the habit or custom." (Evid.Code, § 1105.) We review a trial court's decision regarding the admissibility of habit evidence for abuse of discretion. (*People v. McPeters* (1992) 2 Cal.4th 1148, 1178, 9 Cal.Rptr.2d 834, 832 P.2d 146.)

*15 Whether or not the gun found on the refrigerator was the gun used to commit the present offenses, the evidence of the gun was relevant, i.e., the evidence had a tendency in reason, to prove that appellant had a habit or custom of possessing

nine-millimeter guns, which was relevant to whether he possessed and used a nine-millimeter gun when committing the present offenses. Moreover, Gonzalez socialized with appellant and went to his house almost every other day. The evidence of the gun on the refrigerator was relevant to show appellant possessed a gun, a fact which, in turn, was relevant to show a factual predicate for Gonzalez's knowledge that appellant had guns, and Gonzalez's fear of appellant based on that knowledge. That fear was relevant, in turn, to the issue of Gonzalez's credibility. The trial court did not abuse its discretion by admitting the evidence of the gun found on the refrigerator as against any relevance or Evidence Code section 352 objection posed by appellant, and the evidence was not evidence of appellant's bad character.

People v. Henderson (1976) 58 Cal.App.3d 349, 129 Cal.Rptr. 844 (*Henderson*), cited by appellant, does not compel a contrary conclusion. In *Henderson*, a divided panel concluded that a defendant's mere concurrent possession of two loaded guns, one of specified caliber, the other of unspecified caliber, in his home was irrelevant to the issue of whether the defendant intended to commit assault with a deadly weapon in his home when only the gun of specified caliber was identified as the gun used during the alleged assault. In the present case, there was evidence, from the Roa robbery, the present offenses, and the recovery of the gun on the refrigerator, of appellant's possession (actual or constructive) of a gun of the same specific nine-millimeter caliber on three different respective dates at three different locations. The present offenses were committed at one of the three locations, and that location was not appellant's home. Appellant does not claim the gun used in the present offenses was known or identified. The challenged evidence was relevant, not to the issue of whether appellant intended to

commit assault with a deadly weapon, but to the issue of whether appellant possessed and used a gun of the same specific caliber to commit the present offenses, and to the issue of Gonzalez's credibility. (See *People v. Riser* (1956) 47 Cal.2d 566, 577, 305 P.2d 1.)

Moreover, even if the trial erred by admitting evidence of the gun, the real issue here is identity, and, as mentioned, there was ample evidence that appellant was the person who killed Tseng. Finally, no violation of appellant's right to a fair trial occurred. (Cf. *People v. Boyette* (2002) 29 Cal.4th 381, 427-428, 127 Cal.Rptr.2d 544, 58 P.3d 391.)

b. *Rodriguez's Testimony Concerning the Gun Was Admissible.*

(1) *Pertinent Facts.*

Rodriguez, a defense witness, testified as follows during cross-examination by the prosecutor. When police raided Rodriguez's one-bedroom apartment, they found the gun on the refrigerator, but Rodriguez had not known the gun was there. Rodriguez and appellant lived in one bedroom, and the baby, who was almost four years old, slept with them. The child was a "regular active little boy." The refrigerator was in the kitchen. The refrigerator was neither normal-sized nor gigantic.

Rodriguez suggested the refrigerator was "cornered into ... a top shelf," that the top shelf was right above the refrigerator, and that the shelf covered half of the refrigerator. Rodriguez went to the refrigerator every day. Rodriguez did not like guns in her house, and would not have let appellant have a gun in the house.

(2) *Analysis.*

Appellant claims the above evidence had no probative value on any issue in this case. We disagree. We already have concluded that evidence of the gun on the refrigerator was admissible to show that appellant possessed it, a fact relevant to (1) whether he possessed and used a nine-millimeter gun when he committed the present offenses, and (2) Gonzalez's credibility.

The evidence that Rodriguez, who lived with appellant, did not know the gun was on the refrigerator was relevant to show that appellant exclusively possessed the gun. The trial court did not abuse its discretion by admitting the challenged testimony of Rodriguez as against any relevance or Evidence Code section 352 objection posed by appellant, and Rodriguez's testimony was neither evidence of her character nor evidence of appellant's character. Moreover, there was ample identification evidence identifying appellant as the person who murdered Tseng; therefore, the alleged trial court error was not prejudicial. (*People v. Watson, supra,* 46 Cal.2d at p. 836, 299 P.2d 243.)

c. *Rodriguez's Spousal Abuse Complaint Was Admissible.*

***16** During cross-examination by the prosecutor, Rodriguez denied she was afraid for her safety if appellant was with her, and denied she had ever been afraid for her safety. The prosecutor then elicited testimony from Rodriguez to the effect that (1) in 1998, she filed a police report claiming that appellant, who was angry, punched her in the face and arm, and (2) her testimony at the present trial that she had never been afraid of appellant was a lie.

Appellant claims Rodriguez's above testimony was inadmissible impeachment and inadmissible evidence of appellant's character. We disagree. Rodriguez's testimony was properly elicited to attack her credibility by providing evidence not merely that she had presented false testimony but her testimony might have been influenced by fear of appellant. Rodriguez's credibility was not a collateral issue. The trial court did not abuse its discretion by admitting Rodriguez's testimony. Moreover, there was ample identification evidence identifying appellant as the person who murdered Tseng; therefore, the alleged trial court error was not prejudicial. (*People v. Watson, supra,* 46 Cal.2d at p. 836, 299 P.2d 243.)

d. *The Trial Court's Rulings Concerning Evidence Appellant Offered to Bolster Rodriguez's Credibility Were Proper.*

During the redirect examination of Rodriguez, she testified that she worked. The following then occurred: "Q Where do you work? [¶] [The Prosecutor]: It's irrelevant. [¶] The Witness: I work for Pacific Clinics. [¶] The Court: ... [¶] Where she works is in. What she does for a living is out. Let's move forward."

The following occurred shortly thereafter: "Q By [Appellant's Counsel]: Do you have a college degree? [¶] A I have my bachelor's degree. [¶] [The Prosecutor]: Irrelevant. [¶] The Court: Sustained. The objection is sustained. [¶] Any personal information about what she does for a living, educational background, church affiliation, if any, none of those things are relevant."

Appellant claims the trial court erroneously excluded evidence of Rodriguez's good character, namely, evidence of her employment and education, offered to bolster her credibility. We disagree. Evidence concerning where Rodriguez worked and whether she

had a college degree was irrelevant, i.e., it had no tendency in reason to prove that Rodriguez was a credible witness. The trial court did not abuse its discretion by excluding evidence as to where Rodriguez worked or by sustaining the prosecutor's relevance objection to appellant's question as to whether Rodriguez had a college degree, and the trial court did not erroneously exclude evidence of Rodriguez's good character.

4. *The Trial Court Properly Admitted Evidence of the Statement Made by Chairez to Roa During the Roa Robbery.*

a. *Pertinent Facts.*

Roa, a People's witness, testified as follows during direct examination. In 2005, Roa agreed to sell marijuana to Chairez at a prearranged location. The two arrived at the location in separate vehicles. Chairez exited his vehicle and approached Roa in his vehicle. Roa gave Chairez a gram of marijuana as a sample, and Chairez returned to his vehicle.

***17** The following then occurred: "Q By [The Prosecutor]: Did [Chairez] say anything before he went back? [¶] [Appellant's Counsel]: Objection. Hearsay. Improper. [¶] The Court: Overruled .[¶] You may answer. [¶] Q By [The Prosecutor]: Did he say why he was walking away from you? [¶] A Oh, he said, 'Let me go show my uncle real quick.' [¶] Q Let me go what? [¶] A 'Let me go show my uncle real quick.' [¶] [Appellant's Counsel]: Objection. Improper. [¶] The Court: The objection is noted and overruled. [¶] The Witness: He said 'Let me go show my uncle real quick,' and then walked back to the car."

b. *Analysis.*

Appendix 40

Appellant claims that Chairez's statement to Roa during the Roa robbery was inadmissible hearsay and the trial court erred by admitting it. We disagree. Evidence Code section 1241, which codifies the contemporaneous statement hearsay exception, provides, "Evidence of a statement is not made inadmissible by the hearsay rule if the statement: [¶] (a) Is offered to explain, qualify, or make understandable conduct of the declarant; and [¶] (b) Was made while the declarant was engaged in such conduct." An appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence, including one that turns on whether a hearsay exception applies. (*People v. Waidla, supra,* 22 Cal.4th at p. 725, 94 Cal.Rptr.2d 396, 996 P.2d 46.)

We have set forth the pertinent facts. We conclude the contemporaneous statement hearsay exception of Evidence Code section 1241, applied to Chairez's statement, "Let me go show my uncle real quick"; therefore, the statement was admissible.

Appellant, in his reply brief, argues the statement was not admissible because Chairez, the hearsay declarant, did not testify to Chairezs statement and appellant was unable to cross-examine him about it. He also argues that if Chairez and appellant had been jointly tried for the Roa robbery, Chairezs statement would have been inadmissible under *Bruton / Aranda* principles. However, Evidence Code section 1241, does not, by its terms, require that the hearsay declarant testify. (See *People v. Marchialette* (1975) 45 Cal.App.3d 974, 978-980, 119 Cal.Rptr. 816.) Moreover, *Bruton / Aranda* admissibility principles are inapplicable in the present case if for no other reason that they apply only in a joint jury trial. (*People v. Aranda* (1965) 63 Cal.2d 518, 528-531, 47 Cal.Rptr.

353, 407 P.2d 265; *Bruton v. United States* (1968) 391 U.S. 123, 124-128, fn. 3, 129-136, 88 S.Ct. 1620, 20 L.Ed.2d 476.) Appellant never had a jury trial concerning the Roa robbery because the matter was, as to him, an uncharged offense.

5. *The Trial Court's Exclusion of Gonzalez's Statement to Chairez Was Not Prejudicial Error.*

a. *Pertinent Facts.*

During appellant's cross-examination of Gonzalez, a People's witness, Gonzalez testified that Chairez and Gonzalez occasionally had smoked weed together. The following later occurred during said cross-examination: "Q [Appellant's Counsel:] And under one of these times that you guys were smoking weed you told Larry Chairez that it was Ricky Martinez that shot Jack Tseng, didn't you? [¶] A [Gonzalez:]: I never told Larry anything. I never talked to him about this case. Period."

***18** During the defense presentation of evidence, the court and parties discussed the admissibility of defense testimony by Chairez. The prosecutor sought exclusion of testimony from Chairez that " 'Gonzalez told me that [Martinez] said he did it.' " The prosecutor commented, "[Chairez's] going to say: I spoke to Gonzalez. Gonzalez said that Martinez admitted to him doing the murder."

The prosecutor, citing various cases, argued that Martinez's alleged statement to Gonzalez was not admissible under the declaration against interest hearsay exception because Martinez was not

unavailable and Martinez's alleged statement was unreliable.[13]

The court later asked if appellant's counsel needed to consider cases concerning "the statement by [Chairez] that [Gonzalez] said that [Martinez] told him that [Martinez] had done it[.]" Appellant's counsel replied, "No." Appellant's counsel then indicated that the People's theory might have been that "[Martinez] told Gonzalez that he did it," but Martinez may not have made such a statement and Gonzalez himself may have known that Martinez committed the offense. The court asked, in effect, what Chairez was going to testify. Appellant's counsel replied that all that Chairez had testified at the preliminary hearing was, "Gonzalez told [Chairez] that [Martinez] shot [Tseng]." The court suggested the testimony would be double hearsay implicating the issue of whether Martinez was available to testify.

The court later asked appellant's counsel, "are you intending to ask [Chairez] what [Gonzalez] told [Chairez]?" Appellant's counsel indicated yes. After reviewing cases cited by the prosecutor, the court indicated that Martinez's unavailability had not been shown; therefore, the declaration against interest

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[13] Evidence Code section 1230, states: "Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true."

hearsay exception had not been satisfied as to Martinez's alleged statement to Gonzalez.

Appellant later argued that Chairez's anticipated testimony that Gonzalez told Chairez that Martinez shot and killed Tseng was a prior inconsistent statement which impeached the testimony which Gonzalez gave during cross-examination that Gonzalez never talked with Chairez. The court indicated there was a problem with double hearsay and the reliability issues raised by the cases cited by the prosecutor.

During discussions the next day, appellant argued that exclusion of Chairez's testimony would violate appellant's right to due process. Appellant's counsel also commented, "We can assume that Luis Gonzalez got the information from Ricky Martinez." The court indicated that its tentative decision of the previous day would be its final ruling. The prosecutor suggested that, insofar as appellant was arguing that Gonzalez's statement to Chairez was admissible as a prior inconsistent statement, Gonzalez's statement was ambiguous and speculative. The trial court did not permit Chairez to testify that Gonzalez told Chairez either (1) that Martinez committed the murder or (2) that Martinez told Gonzalez that Martinez committed the murder.

b. *Analysis.*

***19** Appellant claims the trial court erroneously excluded testimony from Chairez that Gonzalez told Chairez that Martinez killed Tseng. The claim is unavailing. Although the record is not a model of clarity, the record, fairly read, reflects that appellant's proffered testimony from Chairez was arguably (1) not that Gonzalez told Chairez *that Martinez told Gonzalez* that Martinez killed Tseng, but simply (2) that Gonzalez told Chairez *that Martinez killed Tseng.* If

the proffered testimony from Chairez was that Gonzalez told Chairez that Martinez killed Tseng, this was not double hearsay. Moreover, if Gonzalez's statement to Chairez was hearsay, it arguably was admissible under the prior inconsistent statement hearsay exception to impeach Gonzalez's testimony during cross-examination by appellant that Gonzalez never told Chairez anything.[14]

However, there is no need to decide whether the trial court erroneously excluded testimony from Chairez that Gonzalez told Chairez that Martinez killed Tseng. The jury heard other evidence, including evidence of Gonzalez's statements to police, that Gonzalez blamed Martinez for the killing of Tseng. The jury also heard evidence that Gonzalez's efforts to implicate Martinez were fabrications which preceded his later truthful incrimination of appellant as the killer. The real issue here is identity, and there is ample evidence that appellant was the person who killed Tseng. Any trial court error in excluding Chairez's testimony at issue was not prejudicial.

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[14] Evidence Code section 1235, states, "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770." Respondent's argument, unsupported by authority, that Gonzalez's statement "was not admissible as a prior inconsistent statement because the statement was premised upon hearsay rather than personal knowledge" appears to miss the mark. Arguably, the issue is not whether Gonzalez stated something "premised" upon, e.g., something Martinez stated, but whether Gonzalez stated that Martinez stated something.

(*People v. Watson, supra,* 46 Cal.2d at p. 836, 299 P.2d 243.)[15]

DISPOSITION

The judgment is affirmed.

We concur: KLEIN, P.J., and ALDRICH, J.
Cal.App. 2 Dist.,2009.
People v. Rios

Not Reported in Cal.Rptr.3d, 2009 WL 2371233 (Cal.App. 2 Dist.)

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[15] In light of our analysis, we reject appellant's claim that cumulative prejudicial error occurred.

Appendix 46

Supreme Court
FILED
Nov. 19, 2009
Frederick K. Ohlrigh, Clerk

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___Deputy

Court of Appeal, Second Appellate District,
Division Three - No. B203606

S176358

IN THE SUPREME COURT OF CALIFORNIA

In Banc

THE PEOPLE,
Plaintiff and Respondent,

v.

ANTHONY ARMANDO RIOS,
Defendant and Appellant

The petition for review is denied.

GEORGE
Chief Justice